United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL

Advice Memorandum

DATE: January 6, 2003

TO : Robert H. Miller, Regional Director
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Timothy W. Peck, Assistant to the Regional Director
Region 20

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: Teamsters Local 665
(Flying Dutchman Park, Inc.) 560-2575-6746
Case 20-CC-3397-1 560-7540-4080-6200
560-7540-8060-6700

This case was submitted for advice as to whether the Union violated Section 8(b)(4)(ii)(B) by picketing and distributing handbills outside an enclosed shopping mall where a valet parking company (the primary employer) performed services, and by attempting to pressure a neutral department store in the shopping mall to alter its business relationship with the parking company.

We agree with the Region that complaint should issue, absent settlement, alleging that the Union violated Section 8(b)(4)(ii)(B) by picketing at a common situs with the objective of disrupting a business relationship of a company with which it does not have a primary labor dispute. Thus, the Union's picket signs did not adequately identify the primary employer, and Union statements conditioning removal of the pickets upon some action by the neutral further demonstrate an unlawful secondary boycott. The Region should not, however, allege that the Union's handbilling was unlawful because it did not mislead or falsely identify the parties to the primary labor dispute.

FACTS

Nordstrom is a department store in a completely enclosed shopping mall located at Fifth and Market Streets in downtown San Francisco.[1] Flying Dutchman Park, Inc. (Dutchman) has a contract with Nordstrom to provide valet

[1] Nordstrom does not have a direct entrance to its store from either Fifth or Market Street; customers must enter the mall and take an elevator or escalator to Nordstrom, which occupies the fourth through eighth floors of the mall. Nordstrom is the largest retailer at the mall.

parking services outside the Fifth Street entrance to the mall.[2] Dutchman employees drive customers' cars to a parking lot owned by Nordstrom located about two blocks from the mall. The valet parking service is provided by Nordstrom, through Dutchman, to all customers of the mall, but Nordstrom customers receive a discount.[3] Large, wheeled placards advertising the valet parking service are located on the sidewalk outside the mall. The placards state:

> VALET PARKING. Please do not leave car unattended. Validated rates with Nordstrom receipt. $3.50 each hr. $20^{00} maximum. Unvalidated rates. $6.00 each hr. $20^{00} maximum.

Another sign located on the sidewalk at the valet stand states "Nordstrom Valet Park."[4]

Teamsters Local 665 (the Union) has collective bargaining agreements with several parking companies in San Francisco. The Union does not represent Dutchman employees, though it once did. The Union is involved in a labor dispute with Dutchman and other commonly owned parking companies.

On November 1, 2002, from about 9:30 a.m. to about 4:00 p.m., the Union picketed and distributed handbills on the sidewalk at the Fifth Street entrance to the mall, in the area where customers stop their cars for valet parking service. About 10 to 12 pickets held signs reading "Please Don't Park Here," with a picture of a red rat at the bottom of the sign. Some of the pickets handed out leaflets that identified Dutchman as the offending employer.[5] The leaflets stated inter alia that Dutchman's employees receive "wages that are half the industry standard" and

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[2] The most recent contract between Dutchman and Nordstrom is in effect until February 28, 2007. The contract apparently cannot be terminated unless one of the parties breaches it.

[3] According to Nordstrom store manager Carpenter, one reason Nordstrom provides valet parking for its customers is that there is virtually no other parking available in the area.

[4] Nordstrom apparently also sends invitations to customers regarding sales events and other promotions that state that valet parking is available. Some customers receive a valet parking gold card, with Nordstrom's name on it, that can be used for free valet parking at the store.

[5] The leaflets did not identify the Union or any other employer.

that Dutchman leaves cars "on a less-than-secure lot on Sixth Street's Skid Row."[6]

Shortly after the picketing began, Nordstrom store manager Carpenter visited the picket line and asked Union business agent Martin about the picketing. Martin explained that the picketing was unrelated to Nordstrom and that the Union's dispute was with Dutchman because it was non-union. Martin also mentioned that the Union had picketed Dutchman at another location on Van Ness Avenue, but that it had been ineffective.

Carpenter then left the picket line and spoke with Nordstrom regional manager McWilliams. Carpenter and McWilliams returned to the picket line. McWilliams told Martin that Nordstrom was neutral and, if necessary, would either replace Dutchman with another valet company or have Nordstrom employees perform the valet service until the issue was resolved. Martin stated that the picketers would leave if Dutchman were replaced.

Later that morning, Martin called McWilliams and stated that if Nordstrom needed a valet service, the Union recommended California Parking and American Parking (both signatory to Union contracts). McWilliams later received unsolicited calls from representatives of California Parking and American Parking.

Later that day, Nordstrom decided to use a different valet service, Penny Valet, which was related to Dutchman through common ownership. Carpenter phoned Martin and informed him that Nordstrom had found a new parking service. Martin asked Carpenter who the new company was and Carpenter replied that she did not know its name. Martin said that the pickets would leave as soon as the Union saw a new parking service arrive.

At about 2:00 p.m., Penny Valet began providing parking service. The pickets did not leave. Union president Gleason called McWilliams and informed her that Penny Valet was a division of Dutchman and that the Union was not happy with that solution. Gleason then suggested that Nordstrom use alternative valet services, such as California Parking and American Parking, and offered to have those companies contact Nordstrom.

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[6] Nordstrom disputes the statement regarding the security of its parking lot, and Dutchman disputes the assertion that its workforce is paid half the industry standard. The Union [*FOIA Exemptions 6, 7(C), and 7(D)*] support the leaflets' assertions.

Shortly thereafter, Gleason left a voice mail message for Nordstrom operations manager Camarda. Gleason explained that Penny Valet was the same entity as Dutchman. He stated that he had just spoken with McWilliams, and that she had agreed that Nordstrom would use another company, such as California Parking. Gleason stated that "California Parking is acceptable to us and we'll have no other issues if California Parking was to be put in there." He then provided California Parking's phone number and identified its contact person.

After listening to the message, Camarda contacted California Parking to inquire about obtaining its valet parking services for an indefinite period of time. California Parking informed Camarda that it could not take over the service on such short notice, but could prepare a bid for use at a later date.

When Camarda told Gleason that he had been unable to obtain the services of an alternative parking company, Gleason described the Union's dispute with Dutchman. Camarda explained that he understood, but that he had an operation to run, and asked what Nordstrom could do to end the picketing. Gleason indicated that the problem would be solved if Nordstrom switched parking companies. Camarda stated that switching parking companies was not easy and asked whether the Union could cease picketing while he researched the issue further. Gleason stated that the Union would cease picketing for the rest of November. Camarda then asked Gleason to send him a list of parking companies acceptable to the Union. The pickets left at about 4:00 p.m. and have not returned.

On November 26, several weeks after the instant charge was filed, the Union's attorney sent a letter to McWilliams. The letter sets forth the Union's position that its picket signs adequately identified the primary dispute and that its communications with Nordstrom management personnel did no more than confirm that its dispute was with Dutchman and other companies under common ownership. The letter further states that in any event, the Union's dispute is with Dutchman and that only Dutchman can take the steps necessary to resolve the dispute; that the Union was not conditioning cessation of picketing, and will not condition the cessation of any future picketing, upon any conduct by Nordstrom; and that any future picketing of Dutchman on Fifth Street will name Dutchman as the primary employer and make clear that the Union has no dispute with any other employer in the shopping mall.

ACTION

The Union's picketing at this common situs at the mall violated Section 8(b)(4)(ii)(B) because the Union's picket signs did not adequately identify the primary employer, and Union statements conditioning removal of the pickets upon some action by Nordstrom otherwise demonstrate an unlawful secondary boycott. The Region should not, however, allege that the Union's handbilling violated the Act because it does not mislead or falsely identify the entities engaged in the primary labor dispute.

A. The Union failed to comply with one of the Moore Dry Dock standards.

In Moore Dry Dock, the Board created several criteria to help resolve whether a union has the proscribed motive of enmeshing neutral employers when it pickets at a common situs.[7] Under that standard, common situs picketing generally is lawful if: (1) the picketing is strictly limited to times when the situs of the dispute is located on the neutral employer's premises; (2) at the time of the picketing the primary employer is engaged in its normal business at the site; (3) the picketing is limited to places reasonably close to the location of the situs of the dispute; and (4) the picketing discloses clearly that the dispute is with the primary employer.[8] Picketing at a common situs presumptively violates Section 8(b)(4)(B) if the union disregards any of the requirements of Moore Dry Dock.[9]

The Union presumptively violated Section 8(b)(4)(ii)(B), because its common situs picketing did not adequately identify the primary labor dispute. The picket signs did not name the primary employer, Dutchman.[10] We reject the argument that the signs were acceptable under

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[7] Sailors' Union of the Pacific (Moore Dry Dock Co.), 92 NLRB 547 (1950).

[8] Id. at 549.

[9] See, e.g., Iron Workers Local 433 (United Steel), 293 NLRB 621, 622 (1989), enfd. mem. 930 F.2d 28 (9th Cir. 1991).

[10] See, e.g., ibid. (union presumptively violated 8(b)(4)(ii)(B) by picketing common situs with signs that did not identify primary employer; "[i]t is a simple matter for a union to identify the primary employer on its signs").

Moore Dry Dock because "Do Not Park Here" related to parking rather than shopping or patronizing.

In Andersen Co. Electrical, the Board held that a union sufficiently identified the primary dispute under Moore Dry Dock where its picket signs stated "Electrical work on this project unfair to wages and conditions of [the union]."[11] Although the signs did not include the primary's name, the primary was the only electrical contractor on the construction site.[12] But unlike Andersen Co. Electrical, the Union's picket signs did not unambiguously identify the work performed by the primary. Thus, although the signs contained the word "park," they did not specifically protest the "parking work" or "parking services" at issue in the Union's primary dispute.[13] Moreover, the picketing took place amid large placards tying Nordstrom to the valet service and a sign advertising "Nordstrom Valet Park." Considering all of the circumstances, the Union's vague picket signs did not clearly indicate that its dispute was with Dutchman rather than Nordstrom (or even some other employer operating in the mall).[14]

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[11] Electrical Workers IBEW Local 59 (Andersen Co. Electrical Service), 135 NLRB 504, 505 (1962).

[12] Ibid. But see Electrical Workers IBEW Local 25 (A.C. Electric), 148 NLRB 1560, 1564, n.12 (1964), enfd. per curiam 351 F.2d 593 (2d. Cir. 1965) (generic picket signs stating "To the public, electricians on this job are not working under wages and conditions established by [the union]," did not clearly disclose that the dispute was with the primary under Moore Dry Dock, even though the primary was the only electrical contractor at the site).

[13] In any event, in light of Carpenter's assertion that there is virtually no other parking in the area, the phrase "Do Not Park Here" may, as a practical matter, be synonymous with "Do Not Shop Here."

[14] We further agree with the Region that the Union's leaflets, which identified the primary dispute, did not remedy its failure to adequately identify the primary dispute on its picket signs. See Local 248, Meat & Allied Food Workers, 230 NLRB 189 n.3 (1977), enfd. 571 F.2d 587 (7th Cir. 1978) (handbills identifying primary employer and struck product did not cure violation where picket signs failed to identify primary and struck product). Compare American Newspaper Guild (Youngstown Arc Engraving Co.), 153 NLRB 744, 745-46 (1965) (under totality of the circumstances, newspaper guild adequately identified primary where one of three simultaneously-displayed picket

B. The communications between the Union and Nordstrom on November 1 constitute additional evidence of the Union's unlawful object.

The Board may find a Section 8(b)(4)(ii)(B) violation notwithstanding technical compliance with Moore Dry Dock if other evidence discloses a real purpose to enmesh neutrals in the dispute.[15] A union does not violate 8(b)(4)(ii)(B) by stating, in response to a question by a neutral employer, that it will cease picketing if the primary is no longer at the premises, because the union is merely confirming the existence of a primary labor dispute.[16] However, when a union takes the additional step of conditioning removal of the pickets upon some action to be taken by the neutral employer, the union violates the secondary boycott provisions of the Act.[17] Thus, in Rollins Communications, a union representative responded to an inquiry from a neutral general contractor by conditioning

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signs identified the primary; all of the signs clearly identified the union as the newspaper guild; and leaflets showed that dispute was with primary).

[15] See Electrical Workers IBEW Local 441 (Rollins Communications), 222 NLRB 99, 99-100 (1976), enfd. mem. 569 F.2d 160 (D.C. Cir. 1977), on remand from 510 F.2d 1274 (1975), denying enforcement to 208 NLRB 943 (1974).

[16] Electrical Workers IBEW Local 453 (Southern Sun Electric Corp.), 237 NLRB 829, 830 (1978), enfd. 620 F.2d 170 (8th Cir. 1980) (no violation for union representative to tell neutral that its picketing would end if the primary was off the job, where: neutral initiated conversation; union remark was in response to direct question by neutral; remark was informational and was neither intended nor understood as a request for assistance; and although neutral took no action after the conversation, union voluntarily terminated picketing the same day); Carpenters District Council of Detroit (Douglas Co.), 322 NLRB 612, 612 (1996) (no violation where neutral approached union at picket line and asked what it would take to resolve picketing, and union responded by stating "to have a prevailing wage contractor do the work"); Carpenters District Council (Apollo Dry Wall), 211 NLRB 291, n.1 (1974) (union's vague reference to "trouble" or "problems" in a single conversation with a neutral employer was too ambiguous to rise to the level of threat or coercion under 8(b)(4)(ii)(B)).

[17] Rollins Communications, 222 NLRB at 101.

the cessation of picketing upon the neutral contractor's written assurance that the primary subcontractor would not work on the job until the primary's employees were paid prevailing wages and benefits.[18] The union's demand for the letter constituted deliberate entanglement of the neutral in its dispute, rather than a mere confirmation of its obligation under Board law to cease picketing if the primary was not present.[19]

The initial conversations between Nordstrom management personnel and Union business agent Martin do not evince an unlawful secondary object on the part of the Union. The conversations were, for the most part, initiated by Nordstrom management personnel. Martin merely informed them of the Union's labor dispute with Dutchman, and confirmed its obligation under Board law to remove the picketers if Dutchman were replaced. He did not affirmatively condition the cessation of picketing upon action by Nordstrom.[20]

However, Union president Gleason's statements did demonstrate an unlawful secondary object to enmesh Nordstrom in its dispute with Dutchman. After Nordstrom had already replaced Dutchman with Penny Valet in an attempt to bring an end to the picketing, Gleason told Carpenter that the Union was unhappy with Nordstrom's "solution" because the Union's dispute was also with Penny Valet. He then suggested acceptable alternative parking companies, and offered to have those companies contact Nordstrom. Shortly thereafter, Gleason left a voice mail message for Camarda, stating that California Parking was an "acceptable" replacement for Dutchman, and implying that the picketing would stop if Nordstrom used that company. Moreover, upon learning that Camarda (having acceded to Gleason's voice mail demands) was unable to obtain California Parking's services, Gleason guaranteed Nordstrom a month without picketing while Camarda tried to secure other acceptable parking companies to replace Dutchman.[21]

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[18] Id. at 100.

[19] Id. at 100-101.

[20] See Southern Sun Electric Corp., 237 NLRB at 830.

[21] See Electrical Workers IBEW Local 3 (Hylan Electric Co.), 204 NLRB 193, 195 (1973) (picketing unlawful where union supplied neutral with list of contractors acceptable to the union and, in response to neutral's request for opportunity to call contractor on union list, union representative agreed to remove pickets).

By this conduct, Gleason had clearly moved beyond innocent recitations of the Union's obligations under the law, and instead shifted onto Nordstrom the burden of resolving its labor dispute with Dutchman.[22] By actively placing conditions upon the removal of the pickets – in effect telling Nordstrom that it alone could take the necessary steps to resolve the dispute so long as it replaced Dutchman with an acceptable valet service – the Union crossed the line between lawful and unlawful conduct.[23]

Furthermore, the Union's November 26 letter to Nordstrom did not cure its unlawful conduct. In Teamsters Local 705, a union threatened to picket a neutral employer unless the neutral stopped receiving deliveries from the primary.[24] After a Board charge was filed, the union sent a telegram to the neutral purporting to retract the threat. The Board found that the telegram was insufficient to moot the complaint, even though the union never actually picketed; there was no evidence that the union had ever engaged in such activity before; and the telegram was sent to the neutral before the neutral was scheduled to receive further deliveries from the primary.

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[22] Significantly, Gleason initiated contact with both Carpenter and Camarda. Moreover, he is the Union's president and his actions cannot be described as mere "isolated incidents." Cf. Teamsters Local 50 (E.J. Dougherty Oil), 269 NLRB 170, 176 (1984) (union business agent's suggestion that "union people" would probably "walk off" if the primary remained on the job violated 8(b)(4)(ii)(B); significant that business agent was in position of authority to carry out the threat and that he addressed the particular neutral employer at the site who could accomplish the objective of removing the primary). Compare Southern Sun Electric Corp., 237 NLRB at 830.

[23] See Rollins Communications, 222 NLRB at 100 (union demand for written assurance that neutral contractor would not do business with primary employer unless primary's workers were paid prevailing wages and benefits, unlawful); Electrical Workers Local 369 (Garst-Receveur Construction Co.), 229 NLRB 68, 68-69 (1977), enfd. per curiam 609 F.2d 266 (6th Cir. 1979) (union statements that "a picket line at any gate constitutes an invisible picket line around the entire project" and "[i]f the job was run 100 percent Union and then if [the primary] is off this job, then everything can be cleared up," unlawful).

[24] Teamsters Local 705 (Johns-Manville Products Corp.), 205 NLRB 387, 391-92 (1973), enfd. per curiam 509 F.2d 425 (D.C. Cir. 1974).

C. The Union's handbills did not independently violate the Act and are not further evidence of the Union's unlawful object.

We agree with the Region that the handbills are not unlawful. The Supreme Court has held that handbilling urging a boycott of a neutral employer generally does not constitute "coercion" under 8(b)(4)(B).[25] Applying this precedent, the Board in Delta II held that handbills that tended to mislead the public to believe that a union's primary dispute was with a neutral employer were wholly lawful.[26] The General Counsel has taken the position that the Board should revisit its decision in Delta II to determine whether a wholly misleading or untruthful banner implicating a neutral employer in a labor dispute is proscribed coercion under Section 8(b)(4) instead of constitutionally protected speech.[27] We have never applied that rationale to handbilling. In any event, here the Union's handbills did not untruthfully implicate Nordstrom (or any other employer) in the Union's dispute with Dutchman. On the contrary, the handbills clearly identified the primary dispute with Dutchman and did not mention any other employers. The handbills were only misleading (if at all) as to certain facts underlying the dispute with Dutchman, i.e. substandard wages and its use of an unsafe parking lot. We do not view the handbills as conveying misleading or untruthful statements about Nordstrom and its relationship with Dutchman since they neither mention Nordstrom nor complain about the owner of the lot. Accordingly, the handbilling was not coercive within the meaning of Section 8(b)(4)(ii)(B).

B.J.K.

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[25] Edward J. DeBartolo Corp. v. Florida Gulf Coast Building and Construction Trades Council, 485 U.S. 568 (1988) (DeBartolo II).

[26] Service Employees Local 399 (Delta Air Lines) ("Delta II"), 293 NLRB 602, 603 (1989), on remand from 743 F.2d 1417 (9th Cir. 1984).

[27] Carpenters Local Union No. 1506 (Associated General Contractors of America, San Diego Chapter, Inc.), Case 21-CC-3307, Appeals Minute dated August 22, 2002.